U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17591569

Date: JUL. 22, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional or Alien of Exceptional Ability

The Petitioner, a [redacted] sports organization, seeks classification for the Beneficiary as an individual of exceptional ability as a [redacted] player. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This second preference classification makes immigrant visas available to foreign nationals with a degree of expertise significantly above that normally encountered in the sciences, arts, or business.

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner did not establish that the Beneficiary was an individual of exceptional ability in the sciences or arts. The Director further found that the Petitioner did not comply with regulations requiring a determination of the prevailing wage for the offered position and posting notice of the job opportunity.

On appeal, the Petitioner asserts that the Director erred in excluding [redacted] athletes from the definition of sciences or arts and submits case law in support of its claim that [redacted] athletes are eligible for classification as individuals of exceptional ability in the arts.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The AAO reviews the questions in this matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will dismiss the appeal.

I. LAW

Second preference immigrant visas are available for qualified individuals who are advanced-degree professionals or who, because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States. Section 203(b)(2) of the Act. An advanced degree is one above a baccalaureate.[1] 8 C.F.R. § 204.5(k)(2). Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. *Id.*

[1] The definition of advanced degree also includes a baccalaureate followed by at least five years of progressive experience. 8 C.F.R. § 204.5(k)(2).

Generally, to pursue employment-based immigration and to permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) the employment of a noncitizen in the position will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must submit an approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a noncitizen beneficiary meets the requirements of a certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(k)(3)(ii). Upon approval of the petition, a foreign national may apply for an immigrant visa abroad, or if eligible, adjust status in the United States to lawful permanent resident. *See* section 245 of the Act, 8 U.S.C. § 1255.

This petition is for a Schedule A occupation. A Schedule A occupation is one codified at 20 C.F.R. § 656.5 for which DOL has already determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of noncitizens in such occupations. Petitions for Schedule A occupations do not require the petitioner to test the labor market and obtain a certified ETA Form 9089, Application for Permanent Employment Certification, from DOL prior to filing the petition with USCIS. Instead, the petition is filed directly with USCIS with an uncertified ETA 9089 in duplicate. *See* 8 C.F.R. § 204.5(a)(2); *see also* 20 C.F.R. § 656.15. The general documentation requirements for filing labor certifications for Schedule A occupations are listed in 20 C.F.R. § 656.15(b). Under 20 C.F.R. § 656.15(b)(1), the petition must include a prevailing wage determination (PWD) in accordance with 20 C.F.R. § 656.40.[2] Under 20 C.F.R. § 656.15(b)(2) the petition must also include evidence that the petitioner gave notice of the filing of the Application for Permanent Employment Certification in accordance with 20 C.F.R. § 656.10(d).[3]

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[2] A request for prevailing wage determination is submitted to DOL on Form ETA 9141, Application for Prevailing Wage Determination, which requires that an employer provide the details of the job offer, including the job title, job duties, work location (including whether work will be performed in multiple locations), and the minimum job requirements. After processing, DOL returns the ETA 9141 with a determination of the prevailing wage rate and level for the position described therein.

[3] 20 C.F.R. § 656.10(d) states:

> (1) In applications filed under § 656.15 (Schedule A) … the employer must give notice of the filing of the Application for Permanent Employment Certification and be able to document that notice was provided, if requested by the certifying officer as follows:
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> (i) To the bargaining representative(s) (if any) of the employer's employees …
>
> (ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment … In addition, the employer must publish the notice in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer's organization. The documentation requirement may be satisfied by providing a copy of the posted notice and

Occupations for individuals with exceptional ability in the sciences or arts are designated as Schedule A, Group II occupations. This designation requires that a petitioner submit evidence of the beneficiary's exceptional ability in the sciences or arts as demonstrated by widespread acclaim and international recognition from recognized experts in the field. 20 C.F.R. § 656.15(d)(1). In addition, the petitioner must satisfy at least two of seven criteria (for example awards, memberships, published material, and contributions). 20 C.F.R. § 656.15(d)(1)((i)-(vii).[4] In addition to verifying widespread acclaim and international recognition, the documentation presented must show that the beneficiary worked for the past year in a position that requires an individual of exceptional ability and that the beneficiary's services are sought for a position that requires an individual of exceptional ability. 20 C.F.R. § 656.15(d)(1). As with most filings for an employment-based immigrant that requires a job offer, this petition must include evidence that the prospective United States employer has the ability to pay the proffered wage. 8 C.F.R. § 204.5(g)(2).

II. ANALYSIS

With the initial filing, the Petitioner submitted a completed and signed (undated), Form ETA 750, Parts A and B, Application for Alien Employment Certification, along with documents in support of the Beneficiary's claimed level of expertise in the sport [redacted] In denying the petition, the Director found that the Petitioner did not provide evidence that it requested a PWD from the DOL or that it posted a notice of filing, as required by the general documentation requirements for filing labor certifications for Schedule A occupations listed in 20 C.F.R. § 656.15(b)(1) and (2).[5]

> stating where it was posted, and by providing copies of all the in-house media, whether electronic or print, that were used to distribute notice of the application in accordance with the procedures used for similar positions within the employer's organization.
> . . .
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> (3) The notice of the filing of an Application for Permanent Employment Certification must:
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> (i) State the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
> (ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
> (iii) Provide the address of the appropriate Certifying Officer; and
> (iv) Be provided between 30 and 180 days before filing the application.
> . . .
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> (6) If an application is filed under the Schedule A procedures . . . the notice must contain a description of the job and rate of pay, and must meet the requirements of this section.

[4] In *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010), we held that, "truth is to be determined not by the quantity of evidence alone but by its quality."

[5] If a benefit request does not have a legal basis for approval, and additional evidence would not establish a legal basis for approval, a denial should be issued without first issuing a request for evidence or notice of intent to deny. 1 *USCIS Policy Manual* E.9(B)(1), https://www.uscis.gov/policymanual.

On appeal, the Petitioner does not address this basis for denial or provide the missing required initial evidence. As the Petitioner does not discuss this ground for denial, we consider the issue abandoned or waived on appeal.[6]

The Petitioner does not submit evidence that the petition met the requirements of 20 C.F.R. § 656.15(b). Because we conclude that the Petitioner did not submit the required initial evidence for the requested visa classification, we need not address other issues evident in the record. Since the petition is not approvable, we will dismiss the Petitioner's appeal of the Director's decision.

It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). The Petitioner has not demonstrated by a preponderance of the evidence that it met the regulatory requirements of obtaining a prevailing wage determination or posting the notice of job opportunity prior to filing the petition.

ORDER: The appeal is dismissed.

[6] *See Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012) (when a respondent fails to substantially appeal an issue addressed in a decision, that issue is waived on appeal); *see also Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009) (generally finding that a waived ground of ineligibility may form the sole basis for a dismissed appeal); *Matter of Zhang*, 27 I&N Dec. 569 n.2 (BIA 2019) (finding that an issue not appealed is deemed as abandoned).